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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THERESA AGBOWO and MARGARET
AGBOWO,

Plaintiffs,

vs.

NATIONSTAR MORTGAGE, LLC, and
DOES 1 to 100, inclusive,

Defendants.

Case No. 14-cv-01295-LB

**NOTICE OF MOTION AND MOTION TO
DISMISS PLAINTIFFS' COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

[Filed concurrently with Request for Judicial
Notice; [Proposed] Order]

Date: May 15, 2014
Time: 9:30 a.m.
Crtrm.: C, 15th Floor
Judge: Hon. Laurel Beeler

Action Filed: February 4, 2014
Trial Date: None Set

TO THE COURT, PLAINTIFFS AND THERE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 15, 2014 at 9:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom C; 15th Floor of the above entitled Court located at 450 Golden Gate Avenue, San Francisco, California, 94102, defendant NATIONSTAR MORTGAGE, LLC ("Nationstar" or "Defendant") will and hereby does move the Court to dismiss the Complaint of plaintiffs THERESA AGBOWO and MARGARET AGBOWO ("Plaintiffs") without leave to amend. This Motion is made and based upon Federal Rules of Civil Procedure 8(a), 9(b) and 12(b)(6) on the substantive grounds that allegations contained in the Complaint fail to state a claim upon which relief can be granted.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, Request for Judicial Notice filed herewith, and upon all pleadings, papers, and documents on file herein, as well as any oral argument which may be presented at the time of hearing or any matters of which judicial notice is requested and/or is taken.

DATED: March 27, 2014

SEVERSON & WERSON
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By: /s/R. Travis Campbell
R. Travis Campbell

Attorneys for Defendant
NATIONSTAR MORTGAGE, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs are two of three borrowers who defaulted on a \$417,000 loan secured by a deed of trust against real property in Oakland. For over a year, Nationstar, the loan servicer, repeatedly delayed the foreclosure sale and worked with the borrowers to modify the loan. Unfortunately, Plaintiffs failed to provide all the information Nationstar required for the modification application, such as verifying who lived at the property. As a result, the property was sold at public auction and eventually purchased by a bona fide purchaser for value. Plaintiffs contend that the sale violated section 2923.6(c)-(d) of the California Civil Code (the “Code”), part of the recently enacted Home Owner Bill of Rights (“HBOR”), and that Nationstar committed fraud by failing to review their modification in good faith. The claims fail as a matter of law.

The HBOR only applies to “owner-occupied” properties.¹ To be “owner-occupied,” the property must be the borrowers’ primary residence. There is no allegation that the borrowers lived at the property. Indeed, in her bankruptcy action, Margaret Agbowo stated under penalty of perjury that she owns at least one other property at which one or more of the borrowers may reside. Unless Plaintiffs can affirmatively allege consistent with their Rule 11 obligations, that the property was the principal residence of all three borrowers, including the nonparty Lazarus Agbowo, the HBOR is inapplicable.

Even if the HBOR applied, however, the claim still fails because section 2923.6 only applies to “complete” loan modification applications.² Plaintiffs have not alleged facts showing they submitted a “complete” application. Under the statute, “complete” means that the borrowers supplied all the documents required by Nationstar within a reasonable timeframe specified by Nationstar. Plaintiffs’ conclusory allegations are not enough to show they submitted all the information required by Nationstar within the specified timeframe. Indeed, the allegations in the Complaint show that they did not submit all information within a reasonable time.

¹ Cal. Civ. Code § 2924.15(a).

² Cal. Civ. Code § 2923.6(h).

1 Finally, Plaintiffs cannot state a claim for Fraud and “Bad Faith Consideration of Mortgage
2 Modification.” Plaintiffs have not identified any misrepresentation by Nationstar, nor have they
3 alleged facts constituting reliance, or that any alleged reliance was justified. Indeed, the
4 Complaint and judicially noticeable facts show that Nationstar was actively working with
5 Plaintiffs to obtain the necessary information. The claims are baseless.

6 Because the HBOR does not apply and Plaintiffs cannot identify any basis for a fraud
7 claim, the Complaint should be dismissed with prejudice.

8 II. FACTUAL BACKGROUND

9 A. Loan Origination and Plaintiffs’ Default

10 On September 21, 2006, Lazarus, Theresa and Margaret Agbowo (the “Borrowers”) took
11 out a \$417,000 loan from Home Loan Specialists, Inc. secured by a deed of trust against the real
12 property known as 850 53rd Street, Oakland, California 94608 (“the property”). *See* RJN³ at Ex
13 A. They failed to make their monthly payments and a Notice of Default was recorded on
14 November 10, 2010. *Id.* at Ex. B.

15 B. Margaret Agbowo’s Bankruptcy Petition Revealed She Owns A Second Property

16 To prevent the foreclosure sale of the property, Margaret Agbowo filed a Chapter 13
17 bankruptcy petition on March 3, 2011. *Id.* at Ex. C. In her bankruptcy schedules she disclosed
18 under penalty of perjury that the property is a two bedroom, one bath cottage and that she also
19 owns a separate property in Oakland. *Id.* at Ex. D, p. 3.

20 C. Nationstar Delayed The Foreclosure Sale For Over A Year To Allow The Borrowers 21 Time To Provide The Necessary Information For A Modification

22 Nationstar repeatedly delayed the sale of the property to give the Borrowers time to
23 complete the loan modification application. *Id.* at Exs. E-G. Indeed, Nationstar worked with the
24 Borrowers to help them supply the necessary documents information. *See* Complaint (“Compl.”)
25 at ¶ 9. After Nationstar had delayed the sale twice and the Borrowers had failed to provide the
26 information Nationstar required, such as verifying who lived at the property, the foreclosure sale

27 ³ Request For Judicial Notice In Support Of Motion To Dismiss Complaint (“RJN”).
28

took place on September 26, 2013—almost three (3) full years after the recording of the Notice of Default in 2010. *See* Compl. at ¶¶ 6-7, 9, 14; RJN at Ex. H. This was also nearly a year after the sale had originally been noticed. RJN at Ex. E. Following the sale, Nationstar held the property for over two months, keeping open the possibility of rescission, but eventually sold it to a third party on December 3, 2013, after notifying the Borrowers in writing that it could not modify the loan without proof the property was owner-occupied. *Id.* at ¶ 4. *Id.* at Ex. I.

III. ARGUMENT

A. Standard On Motion To Dismiss Pursuant To Rule 12(b)(6)

A complaint may be dismissed pursuant to Rule 12(b)(6) if a plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In ruling on a motion to dismiss, material factual allegations in the complaint are taken as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1997).

However, the Court need not accept conclusory allegations, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Twombly*, 550 U.S. at 561 (“a wholly conclusory statement of [a] claim” will not survive a motion to dismiss). “[A] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not [survive a motion to dismiss].” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, a complaint will not suffice if it tenders naked assertions devoid of further factual enhancement. *Id.* Nor must the court accept as true allegations in the complaint that contradict documents that are attached as exhibits. *Sprewell*, 266 F.3d at 988; *see also Paulsen v. CNF Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009) (“We are not ... required to accept as true conclusory allegations that are contradicted by documents referred to in the complaint, and we do not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations.”)

B. The Section 2923.6 Claims Fail Because There Is No Allegation That The Property Was The Borrowers’ Principal Residence

Plaintiffs allege that Nationstar violated section 2923.6(c) and (d) of the Code by failing to

“review and consider” their “request for a mortgage modification in good faith” and proceeded with the foreclosure without notifying them that their modification request had been denied. Compl. at ¶¶ 19-21. Section 2923.6(c)-(g) of the Code is part of the HBOR that became effective on January 1, 2013. The HBOR only applies to “first lien mortgages or deeds of trust that are secured by owner-occupied residential real property” Cal. Civ. Code § 2924.15(a) (emphasis added); *id.* § 2923.6(j). To be “owner-occupied” the property must be “the principal residence of the borrower and is security for a loan made for person, family, or household purposes.” *Id.* § 2924.15(a) (emphasis).

“The borrower” here is actually three people as defined by the deed of trust: RJN at Ex. A. Plaintiffs and non-party Lazarus Agbowo. *Id.* As a result, the HBOR is only triggered if Plaintiffs can allege that the property was all three borrowers’ principal residence. Plaintiffs, however, do not allege that the property was the principal residence of any of the Borrowers. Further, Plaintiff Margaret Agbowo’s bankruptcy schedules indicate that one or more of the Borrowers may have resided at a different property. *See* RJN at Ex. D, p. 3. Indeed, the property at issue is a two bedroom, one bathroom cottage, further supporting the conclusion that it was not the principal residence for all three Borrowers. *Id.* Regardless, unless Plaintiffs can allege that the property was “owner-occupied” as defined by the statute, the HBOR claim must be dismissed with prejudice.

C. The Section 2923.6 Claim Fails Because Plaintiffs Do Not Allege Facts Showing They Submitted A Complete Loan Modification Application

Even if the HBOR did apply, Plaintiffs have not pled facts showing they submitted a complete application. Section 2923.6(c)-(g) governs how a lender must proceed when the borrower submits a “complete application for first lien loan modification.” *Id.* § 2923.6(c)-(g). An application is only “complete” when “the borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.” *Id.* § 2923.6(h) (emphasis added).

Thus, alleging that the property was “owner-occupied” is necessary to state a prima facie case under section 2923.6, but not sufficient; Plaintiffs must also allege: 1) that they “supplied all

of the documents required by” Nationstar and 2) that the documents were supplied “within the reasonable timeframes specified by” Nationstar. *See* Cal. Civ. Code §§ 2923.6(j), 2924.15(a), 2923.6(h). There are no facts to satisfy either of these elements.

1. Plaintiffs Do Not Allege Facts Showing They Supplied Nationstar With All The Required Documents

Plaintiffs concede that in the months leading up to the foreclose sale Nationstar required that they provide additional documents and information in order to complete the modification application. *See* Compl. at ¶ 9. Allegedly, three days before the foreclosure sale, Plaintiffs claim a third party “submitted information requested by defendant” and they “reasonably believed that all of the information required by Defendant had been provided.” *See* Compl. at ¶¶ 7, 9. These conclusory allegations merely reiterate the statute and are not entitled to the assumption of truth. *See Paulsen*, 559 F.3d at 1071 (“we do not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations.”).

Plaintiffs must allege what documents Nationstar required and what documents Plaintiffs supplied. Other than referencing two documents, Plaintiffs’ Complaint sheds no light on what “additional information” Nationstar was requesting from them and whether they provided it. *See* Compl. at ¶ 9. Plaintiffs also do not allege that they ever confirmed with Nationstar who actually lived at the property. As discussed above, to this day it is entirely unclear. Indeed, this was the basis for Nationstar’s written notice denying the modification request.

Plaintiffs were clearly frustrated with having to submit information in connection with the modification application, but to be a “complete” application, Plaintiffs must allege facts showing they “supplied the mortgage servicer with all documents required by the mortgage servicer.” Cal. Civ. Code § 2923.6(h). Plaintiffs conclusory allegation that they submitted the information requested three days before the sale is insufficient.

2. Plaintiffs Do Not Allege That Any Modification Application Was Submitted In The TimeFrame Prescribed By Nationstar

Plaintiffs also fail to allege what timeframe Nationstar required them to submit the “additional documents” within and that the documents they did allegedly submit were within that timeframe. Indeed, facts subject to judicial notice show that Nationstar was actively working with

1 Plaintiffs for over a year. *See* RJN at Exs. E-G. Further, Plaintiffs concede they were continuing
 2 to submit documents up until three days before the sale. Compl. at ¶ 7. As a result, it is likely that
 3 the documents were not submitted within the timeframe specified by Nationstar. Regardless,
 4 Plaintiffs silence on this element is fatal to their claim.

5 **D. The “Bad Faith Consideration Of Mortgage Modification” And Fraud Claims Fail**

6 Plaintiffs’ “Bad Faith Consideration Of Mortgage Modification”⁴ and Fraud claims are
 7 based on similar allegations: 1) Nationstar “wrongfully refused to consider” their “request for a
 8 mortgage modification in good faith,” 2) that Nationstar’s alleged acts were “part of [a] scheme”
 9 to obtain possession of the property . . . and then resell it for a profit” and 3) Nationstar
 10 “intentionally misrepresented the status of their request for a home mortgage modification.” *See*
 11 Compl. at ¶ 8, 13, 26, 28-29.

12 To state a claim, Plaintiffs must allege: “(a) misrepresentation (false representation,
 13 concealment, or nondisclosure); (b) knowledge of the statement’s falsity (scienter); (c) intent to
 14 defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage. *Lazar v.*
 15 *Superior Court*, 12 Cal.4th 631, 638 (1996). Further, “in alleging fraud or mistake, a party must
 16 state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b).
 17 “[W]here a complaint includes allegations of fraud, Federal Rule of Civil Procedure 9(b) requires
 18 more specificity including an account of the time, place, and specific content of the false
 19 representations as well as the identities of the parties to the misrepresentations.” *Swartz v. KPMG*
 20 *LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotations omitted).

21 **1. Nationstar Did Not Make Any Misrepresentation**

22 Plaintiffs have not identified any misrepresentation by Nationstar. Not only did Nationstar
 23 consider their request for modification, it delayed the sale of the property multiple times while it

24 ⁴ Nationstar has not uncovered any authority showing a cause of action for “Bad Faith
 25 Consideration Of Mortgage Modification” exists. Nationstar submits it does not. Based on the
 26 allegations of “wrongful intent” (Compl. at ¶ 8), however, the claim sounds in fraud and therefore,
 27 the Court should apply Rule 9(b)’s heightened pleading standard. *See Kearns v. Ford Motor Co.*,
 28 567 F.3d 1120, 1124-25 (9th Cir. 2009) (even if fraud is not “an essential element” of a claim,
 Rule 9(b) still applies to claims that “are grounded in fraud” (also known as claims that “sound in
 fraud”) and to “averments of fraud.”).

1 worked with Plaintiffs to obtain the necessary documents. *See* RJN at Exs. E-G; Compl. at ¶ 9
 2 (“Defendant continued to request additional information from Plaintiffs.”). There was no fraud.
 3 To the contrary, Nationstar was actively working with Plaintiffs to obtain the necessary
 4 information for a complete modification application.

5 Similarly, there was no “scheme” to obtain and sell the property. *See* Compl. at ¶ 13.
 6 Indeed, had there been Nationstar could have refused to even consider their request for a
 7 modification and sold the property in 2012. *See* RJN at Ex. E. They waited over a year
 8 specifically to give Plaintiffs an opportunity to submit the necessary materials to be considered for
 9 a modification. Plaintiffs’ conclusory allegation that there was some type of “scheme” to defraud
 10 them is cynical and meritless.

11 Nor did Nationstar make any misrepresentations in connection with the “status” of the
 12 modification. *See* Compl. at ¶ 28. Plaintiffs own allegations reveal that Nationstar was requesting
 13 additional documents and that Plaintiffs were allegedly still submitting three days before the
 14 foreclosure sale. *Id.* at ¶ 7, 9. Plaintiffs were perfectly aware of the sale date, which was reflected
 15 in the recorded Notice of Trustee’s Sale. RJN at Ex. G. Plaintiffs do not allege that Nationstar
 16 told them they would delay the sale (which they had already done three separate times) and then
 17 proceeded with it. There was no misrepresentation, and based on the facts alleged in the
 18 Complaint, theories of liability based on misrepresentations simply do not make sense.

19 **2. There Are Not Facts Showing Justifiable Reliance**

20 “[T]he mere assertion of ‘reliance’ is insufficient” to state a claim. *Cadlo v. Owens-*
 21 *Illinois, Inc.*, 125 Cal.App.4th 513, 519 (2004). Plaintiffs must show that “the defendant’s
 22 misrepresentation is an immediate cause of the plaintiff’s conduct, altering his legal relations, and
 23 when, absent such a representation, the plaintiff would not, in all reasonable probability, have
 24 entered into the transaction.” *Id.* (citing *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th
 25 951, 976 (1997)).

26 Plaintiffs do not explain how they relied on any alleged misrepresentation or that such
 27 reliance was justified. They merely claim that they “relied on the representations of the
 28 employees of Defendant . . . that they would consider their request for a mortgage modification in

good faith.” Compl. at ¶ 31. This is insufficient. *Cadlo*, 125 Cal.App.4th at 519. Indeed, Plaintiffs do not allege how any misrepresentation caused them to alter their actions. They do not contend they could have cured the default or submit the necessary documents for the modification but for relying on some alleged misrepresentation by Nationstar. Put simply, notwithstanding Plaintiffs’ conclusory allegation to the contrary, there was no reliance.

E. Plaintiffs Request To Set Aside The Foreclosure Sale Fails As A Matter Of Law

Plaintiffs request that the Court set aside the foreclosure sale of the property. *See* Compl. at ¶¶12, 33(C). Claims for damages that are precluded as a matter of law are properly challenged on a Rule 12(b)(6) motion to dismiss. *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010).

Even if successful, none of the causes of action asserted in the Complaint allow Plaintiffs to set aside the foreclosure sale. The remedy for a material violation of Section 2923.6 of the Code after the foreclosure sale has occurred is “actual economic damages” Ca. Civ. Code § 2924.12(b).⁵ Indeed, section 2924.12(e) states that a violation does not “affect the validity of a sale in favor of a bona fide purchase” Here, the property has been sold to a bona fide purchaser for value. *See* Compl. at ¶ 4; RJN at Ex. I. Section 2923.6 does not authorize setting aside the sale.

Similarly, setting aside the sale is not a remedy for fraud. Plaintiffs may only recover actual damages measured as their out-of-pocket pecuniary loss and, if proven by clear and convincing evidence, punitive damages. *See* Cal. Civ. Code § 3294(a); *Alliance Mortg. Co. v. Rothwell*, 10 Cal.4th 1226, 1239-41 (1995) (discussing damages recoverable for fraud claims). They may not set aside the sale.

Because Plaintiffs’ request to set aside the foreclosure sale is not an authorized remedy under any of their claims, it should be dismissed with prejudice.

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⁵ If the material violation is found to be “intentional, reckless, or resulted from willful misconduct” the Court may award “the greater of treble actual damages or statutory damages of fifty thousand dollars” and attorneys’ fees and costs. Ca. Civ. Code §§ 2924.12(b), (i).

IV. CONCLUSION

For the reasons stated herein, Nationstar requests the Court issue an order dismissing the Complaint with prejudice.

DATED: March 27, 2014

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